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Second report on State responsibility

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Addendum

Annex

Interference with contractual rights: a brief review of the comparative law experience

1. In assessing whether article 27 of the draft articles should apply to cases where one State induces another to breach a treaty with a third State, reference is sometimes made to general principles of law, e.g., to the effect that it is a wrong to interfere with the legal right of another, including a contractual right.[1] In order to test this argument at its source, it is useful to undertake a brief comparative review.[2] As will be seen, English, United States, French and German law all recognize that knowingly and intentionally inducing a breach of contract is a civil wrong, but there are important differences between them. By contrast, no such liability seems to be recognized under Islamic law.

[1] See, e.g., H. Lauterpacht, "Contracts to Break a Contract" (1936), in E. Lauterpacht (ed.), *International Law, being the Collected Papers of Hersch Lauterpacht*, vol. 4 (1978) p. 340, at p. 374.

[2] The Special Rapporteur would like to thank Mr. Roger O'Keefe of Magdalene College, Cambridge, for his assistance in preparing this annex, and Professors Heinz Kötz, Basil Markesinis and Tony Weir for their useful comments on it.

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English law[3]

2. The English law of inducing breach of contract is based on a general principle, formulated by Lord Macnaghten in *Quinn v. Leathem* in the following terms:

> "It is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference."[4]

The tort is described variously as inducing or procuring breach of contract, actionable interference with contractual rights or "the principle in *Lumley v. Gye*". It has been applied to contracts of all kinds. Since its inception it has been seen as an aspect of the more general tort of "direct invasion of legal rights". In other words, it has been held wrongful intentionally and without justification to bring about the violation of a legal right, in this case, the legal right of one party vis-à-vis the other to have a contract performed.[5]

3. For an act of inducement to be actionable, three elements are necessary. First, the procurer must know of the existence of the contract and intend to interfere with its performance.[6] However, knowledge of the contract's precise terms is unnecessary.[7] Secondly, the procurer must not have had any sufficient justification for so acting.[8] In this respect, the courts may have regard "to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and ... the object of the person in procuring the breach".[9] To justify an inducement, it is not enough to show that the defendant was acting in good faith in the pursuit of a legitimate interest; there has to be something in the nature of a moral duty,[10] or a distinct legal right to act.[11] Thirdly, the contract must actually have been broken, causing actual damage to the plaintiff.[12]

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[3] The matter is governed by the common law in England, not by statute: the law appears to be substantially similar in other common-law jurisdictions. For the position in the United States see para. 4–5 below.

[4] [1901] AC 495, 510. The tort was first recognized in *Lumley v. Gye* (1853) 2 E & B 216. Leading modern authorities are *J. T. Stratford & Sons Ltd v. Lindley* [1965] AC 269 (HL); *Merkur Island Shipping Corp v. Laughten* [1983] 2 AC 570 (HL); *Associated British Ports v. TGWU* [1989] 1 WLR 939 (CA); *British Telecommunications plc v. Ticehurst* [1992] ICR 383 (CA); *Middlebrook Mushrooms Ltd v. TGWU* [1993] ICR 612 (CA); *Law Debenture Trust Corp v. Ural Caspian Oil Corp Ltd* [1994] 3 WLR 1221 (CA).

[5] See *Lumley v. Gye* (1853) 2 E & B 216, 232 (Erle J); *Allen v. Flood* [1898] AC 1, 96 (Lord Watson); *Quinn v. Leathem* [1901] AC 495, 510 (Lord Macnaghten); *Associated British Ports v. TGWU* [1989] 1 WLR 939, 959 (Butler-Sloss LJ), 964 (Stuart-Smith LJ); *F v. Wirral MBC* [1991] Fam 69, 107 (Ralph Gibson LJ), 114–115 (Stuart-Smith LJ).

[6] See *Merkur Island Shipping Corp v. Laughten* [1983] 2 AC 570, 608 (Lord Diplock); *Middlebrook Mushrooms Ltd v. TGWU* [1993] ICR 612, 621 (Neill LJ).

[7] *Stratford v. Lindley* [1965] AC 269; *Merkur Island Shipping Corp v. Laughten* [1983] 2 AC 570, 609 (Lord Diplock).

[8] According to *Clerk & Lindsell on Torts* (17th ed, London: 1994), 1218, "it is impossible to lay down any general rule about the nature of this defence". See, e.g., *Glamorgan Coal Co v. South Wales Miners' Federation* [1903] 2 KB 545, 573–574 (Romer LJ), 577 (Stirling LJ); *Smithies v. National Association of Operative Plasterers* [1909] 1 KB 310; *Hill v. First National Finance Corp.* [1989] 1 WLR 225 (CA).

[9] *Glamorgan Coal Co.*, 574 (Romer LJ), adopted in *British Industrial Plastics v. Ferguson* [1938] 4 All ER 479, 510 (Slesser LJ) and in *Greig v. Insole* [1978] 1 WLR 302, 340–341 (Slade J).

[10] *Glamorgan Coal Co.*, 574 (Romer LJ), adopted in *British Industrial Plastics v. Ferguson* [1938] 4 All ER 479, 510 (Slesser LJ) and in *Greig v. Insole* [1978] 1 WLR 302, 340–341 (Slade J).

[11] E.g., *Hill v. First National Finance Corporation* [1989] 1 WLR 225. Some other common-law jurisdictions take a more liberal approach to justification.

[12] *Jones Bros. (Hunstanton) Ltd. v. Stevens* [1955] 1 QB 275.

United States law[13]

4. *The Restatement 2d of the Law of Torts* (1977) deals with "Intentional Interference with Performance of Contract by Third Person": §766 provides that:

> "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting from the failure of the third person to perform the contract."

The term "improperly" is used by the drafters of §766 to connote "unjustified". The latter term, which is used most frequently by the courts, was thought to "impl[y] too strongly that the factors involved are all matters of defence". "Factors in Determining Whether Interference is Improper" are spelled out in §767. They include:

"(a) The nature of the actor's conduct,

(b) The actor's motive,

(c) The interests of the other with which the actor's conduct interferes,

(d) The interests sought to be advanced by the actor,

(e) The social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) The proximity or remoteness of the actor's conduct to the interference, and

(g) The relations between the parties."

5. Comment *c* to §766 traces the development of United States law back to the same English source, *Lumley v. Gye*. The tort has been applied in the United States to all types of contract, except contracts to marry.[14] As under English law, there must be knowledge of the contract on the part of the defendant (Comment *i*) and an intention to interfere with the performance of the contract (Comment *j*).

German law[15]

6. Inducing breach of contract ("*Verleitung zum Vertragsbruch*") constitutes a delict under §826 BGB, which establishes a general form of tortious responsibility for intentional infliction of harm *contra bonos mores* ("*sittenwidrig*").[16] But the German law "tak[es] a restrictive view [and] does not regard interference with someone else's contractual rights

[13] The case law is usefully summarized in *Prosser and Keeton on Torts* (5th ed., St. Paul: 1984, with 1988 Pocket Part), §129, concurring with the *Restatement 2d*. Note that, contrary to the position in other states of the United States as well as in France, Louisiana has not recognized the tort.

[14] See Comment *d*. Under English law, the tort applies to contracts of *all* kinds: *Clerk & Lindsell*, 1178. Note, however, that a father was traditionally justified in interfering to prevent a child marrying a person of immoral character: *Glamorgan Coal*, 577 (Stirling LJ) & [1905] AC 239, 249 (Lord James, HL); *Crofter Hand Woven Harris Tweed Co. v. Veitch* [1942] AC 435, 442–443 (Simon LC).

[15] See B. Markesinis, *The German Law of Obligations*. Vol. II, *The Law of Torts: A Comparative Introduction*, 3rd ed., rev. and amend. (Oxford, 1997), p. 898; Zweigert & Kötz, 622–623.

[16] See RG JW 1913, 866; RGZ 78, 14, 17; RG JW 1913, 326; BGH NJW 1981, 2184, as cited by Markesinis, 898. See also cases cited in *Palandt. Bürgerliches Gesetzbuch* (53rd ed., Munich: 1994), §826 mn 52 (ed. H Thomas); *Münchner Kommentar zum Bürgenlichen Gesetzbuch* (3rd ed., Munich: 1997), §826 mn 123ff (ed. P Ulmer).

as tortious conduct in and of itself".[17] Mere knowledge of or "co-operation" in the breach of a contract with a third party will not suffice.[18] The Bundesgerichtshof (BGH) has stated:

> "Contractual claims are not amongst the rights whose infringement in itself gives rise to claims in tort. Nor does the moral order oblige an independent third party in a case of conflict to subordinate its own interests to those of the contracting parties. Thus, there is no claim under §826 BGB for damages against a third party simply on the ground of his cooperation in the violation of [a contract] ... The allegation of conduct *contra bonos mores* is well-founded only in cases of serious offences to feelings of decency, where the course of conduct of a third party is incompatible with the basic requirements of a proper view of the law ('Grundbedürfnissen loyaler Rechtsgesinnung')."[19]

It is well-established in the case law of the BGH that a third party's interference with a contractual relationship is tortious "only when the third party shows a special degree of wanton or reckless behaviour [*Rücksichtslosigkeit*] towards the contracting party who is prejudiced by the breach of contract that occurs".[20] This would be the case, for example, where a third party "collud[es] with the debtor under the contract in order specifically to frustrate the claims of the creditor concerned",[21] or where a third party promises to indemnify the debtor against claims by the creditor.[22] Moreover the breach induced must be central to the performance of the contract as a whole, not a breach of some collateral or incidental provision.

French law[23]

7. Anyone who knowingly assists another to breach a contractual obligation owed by that other commits a delict under articles 1382 and 1383 of the *Code civil* as regards the victim of the breach.[24] It would appear that responsibility for interference with another's contractual obligations ("la responsabilité du tiers complice" or, in some specific senses, "concurrence déloyale") is not dependent upon the defendant's having actually incited or induced the breach in question. Knowledge of the existence of the contractual obligation is sufficient to ground responsibility, as was made clear by the Cour de cassation in *Dlle Pedelmas et autres c. Epoux Morin et autre*.[25] The standard statement of the law is that:

> "Anyone who knowingly assists another to breach a contractual obligation owed by that other commits a delict as regards the victim of the breach ..."[26]

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[17] W. van Gerven et al., *Tort Law. Scope of Protection* (Oxford: 1998), 279.

[18] See BGH NJW 1969, 1293 ff. cited by Markesinis, 898; BGH NJW 1994, 128, excerpted in van Gerven et al., 277–279 (trans N Sims).

[19] BGH NJW 1994, 128, excerpted in van Gerven et al., 278 (with minor amendment, references omitted).

[20] van Gerven et al., 279.

[21] BGH NJW 1994, 128, excerpted in van Gerven et al., 278.

[22] See BGH NJW 1981, 2184, as cited by R Youngs, *English, French & German Comparative Law* (London: 1998), 282, note 422.

[23] For a useful overview see V. Palmer, "A comparative study (from a Common law perspective) of the French action for wrongful interference with contract" (1992) 40 *Am J Comp L* 297.

[24] See Civ 27 mai 1908, *D* 1908, p.459; Com 29 mai 1967, *Bull civ* III, n°209; Com 11 oct 1971, *D* 1972, p.120; Civ 2e 13 avr 1972, *D* 1972, p.440; Civ 3e 10 mai 1972, *Bull civ* III, n°300; Civ 3e 8 jul 1975, *Bull civ* III, n°249; Com 13 mars 1979, *D* 1980, p.1, note Serra; Com 23 avr 1985, *Bull civ* IV, n°124; Com 5 févr 1991, *Bull civ* IV, n°51; Com 4 mai 1993, *Bull civ* IV, n°164.

[25] Com 3 mars 1979, *D* 1980, p.1.

[26] Ibid.

In the words of Savatier's classic text, "case law ..., on the one hand, affirms the delictual character of the responsibility of the collusive third-party and ... on the other hand, limits itself, in principle, to declaring [that party] at fault because of his knowledge of the contract, without any other wrong being required".[27]

8. More explicitly, Serra states in his note on *Pedelmas* c. *Morin*:

> "It is enough for the third party to have acted with full knowledge of the facts, being aware of the existence of the commitment ... with the breach of which he is associated. It is not at all necessary for the third party to have incited the debtor to breach his obligation for him to be considered to have played a determining role in the failure to execute the agreement."[28]

Viney agrees:

> "Knowledge of the contract and the conscious performance of acts which impede its execution are sufficient to establish the responsibility of the third party."[29]

9. These principles were applied to surprising effect in a series of cases, in which it was held that a selective distribution network established under contract by several producers *inter se* can give rise to delictual responsibility under article 1382 on the part of a "rogue" distributor who obtains and sells their products.[30] In *SARL Geparo Im En Export BV* c. *SNC Les Parfums Cacharel et Cie*,[31] the Cour de cassation stated that:

> "In view of article 1382 of the Civil Code ... a non-authorized intermediary of a lawful selective distribution network commits a civil wrong in attempting to obtain from an authorized distributor, in breach of the contract binding him to the network, the sale of products marketed through this mode of distribution ..."[32]

Similarly, in *Soc. Allones Distribution Centre Leclerc et autre* c. *Soc. Anon. Estée Lauder*, the Cour de cassation declared:

> "In view of article 1382 of the Civil Code ... the selective distribution network can be used as evidence against the companies Allones and Direct Distribution, and ... they have committed a delict by importing and selling without being authorized distributors ..."[33]

The novelty of these cases has been noted, but they appear to meet with approval.[34]

10. Obviously, for responsibility to arise, the contract breached must itself be a lawful one. Beyond that, however, there appears to be no express provision on the question of justification for interference with contractual relations. In this respect, it is important to recall that responsibility for interference with contractual relations is seen as a manifestation of the "general duty not to harm others":[35]

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[27] R Savatier, *Traité de la responsabilité civile en droit français. Tome I* (Paris, 1939), §144, footnotes omitted.

[28] Com 3 mars 1979, *D* 1980, p 2. See also *Lehmann* c. *Soc des comédiens français* Req 2 juin 1930, *Gaz Pal* 1930, 2, p 119; *Maréchal* c. *Epoux Lousteau* Com 4 mai 1993, *Bull civ* IV, n°164.

[29] G. Viney, *Introduction à la responsabilité* (2nd ed., Paris, 1995), §207-2.

[30] See Com 16 févr 1988, *Bull civ* IV, n°76; Com 13 déc 1988, *Bull civ* IV, n°343 & 344; Com 31 jan 1989, *Bull civ* IV, n°45; Com 21 mars 1989, *Bull civ* IV, n°98; 10 mai 1989, *D* 1989, p 427, esp 3e, 4e & 5e.

[31] Com 21 mars 1989, *D* 1989, p 427 (4e Espèce).

[32] Ibid.

[33] Com 10 mai 1989, *D* 1989, p 427 (5e Espèce).

[34] Note Bénabent, *D* 1989, p 429 at pp 430–431.

[35] See Savatier (1939), chap. III.

> "Any harm caused by one member of society to another in a case where the former could have foreseen and avoided such harm engenders a presumption of civil wrong and responsibility."[36]

But, as suggested by the use of the word "presumption", "the harm caused may ... be justified by the exercise of a right" — a right which, in "a simple and slightly crude term", Savatier places among "the rights allowing one to harm others".[37] According to Savatier:

> "Most of the time, the rights allowing one to harm others are sufficiently based on fairness. They stem ... from the requirements of life in society. Such rights include, for example, the right to freedom of expression [or] the right to compete ... These are rights to harm others in fairness. Moreover, they are closely correlated with the principles that protect individual freedom, freedom of thought [and] of speech, freedom of commerce and of work ..."[38]

He divides these general justifications into five categories, of which only two need to be mentioned here. The first is what might be called the right to compete:

> "The right to cause certain harm arises from the inevitable parallelism of legitimate human activities: these are competition rights. Whatever the source (competitive examination, bidding, similarity between occupations, among others), what the candidate obtains (an award, a job, a market, a clientele) is acquired only at the expense of others. Although harmful to the latter, his activity is legitimate ..."[39]

Whatever the general validity of this principle, the Cour de cassation in the landmark case of *Dœuillet et Cie* c. *Raudnitz*[40] placed firm limits on the right to compete as it relates to interference with valid contractual obligations, at least in the specific case of contracts of employment. Similar limits have subsequently been applied in principle, if not always on the particular facts, to several other types of commercial contract.

11. Savatier's second justification equates with self-defence and/or necessity:

> "Like parallel activities, legitimate conflicting activities cause inevitable harm. These are the *rights of self-defence*. Thus, there may be a defence either of a legitimate *group* (national, occupational, social or religious), or of an individual. Self-defence, legal proceedings or necessity are ... examples of this."[41]

In the case of the perfume importer/distributor outside the selective distribution network, the Cour de cassation held on the facts that in the absence of proof establishing the irregularity of the acquisition of the goods, the defendant did not breach article 1382. By "irregularity of the acquisition of the goods", the Cour de cassation apparently means their acquisition from a party to the selective distribution agreement in breach of that party's contractual obligation. Similar findings were reached in several of the other cases. In summary, then, the mere act of circumventing the selective distribution agreement (that is, without the involvement of any of the parties to the agreement) does not constitute a violation of article 1382. This is a simple *pacta tertiis* situation. But to do so with the involvement of one of the parties to the agreement constitutes a violation of article 1382, assuming the legality of the agreement is established.

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[36] Ibid., §35.

[37] Ibid., §36.

[38] Ibid. (emphasis in original).

[39] Ibid., §37 (emphasis in original).

[40] Civ 27 mai 1908, *D* 1908, p.459.

[41] Ibid. (emphasis in original). See also ibid., §§60–64.

Islamic law

12. Islamic law embodies no general category of rules of delictual responsibility. Any principles of civil liability must be gleaned from the Qu'ran, Sunna and the opinions of learned jurists. Even then, tortious liability (*jinayah*; sometimes *'uqubat*) does not constitute a coherent legal category but is divided into specific nominate torts such as usurpation (*ghasab*), conversion (*itlaf*), trover (*tasarruf-i beja*), detinue (*habs*) and trespass (*mudakhalat-i beja*).[42]

13. Notwithstanding this, the term *jinayah* has been defined in general terms by a prominent jurist as "an act of transgression which results in damage or injury to a person, his property or honour ... [or] a violation of a right recognized *a priori* by law and which casts civil liability on the defendant".[43] It is not clear whether this definition is simply descriptive of the accepted nominate torts or is also prescriptive; there also appears to be some debate as to the meaning of "a right recognized *a priori* by law".[44] As a result, in the absence of any evidence specifically on point, it is impossible to state whether Islamic law recognizes delictual responsibility for interference with contractual relations.

14. Two things, however, limit the possibility of tortious liability under Islamic law for interference with contractual relations. First, the basis of civil liability under *jinayah* is exclusively intention: a defendant who did not intend to inflict a loss on the plaintiff will not be liable.[45] Secondly, in terms of justification, at least one influential school of Muslim jurists affirms "the principle that 'a wrong caused in the course of exercise of a legal right precludes the defendant of his civil liability' — summed up by an Arabic proposition *al-jawaz al-shar 'iyuna fi al-dhaman*'".[46] Limitation by reference to the public interest (*al-maslaha al-mursalah*) has been suggested by others.[47] Thus even if Islamic law, or systems based upon it, were to recognize the principle of tortious liability for inducing breach of contract, such liability would be very limited.

Conclusions

15. This brief review shows that, while the four European systems reviewed recognize that knowingly and intentionally inducing a breach of contract is a civil wrong, they approach the matter in different ways, and these differences are accentuated if one brings into account a wider range of comparisons, such as, for example, Islamic law or Russian law. Thus while it may be that some of these systems produce similar results in practice,[48] that is by no means universally so. Moreover, a number of additional points can be made. First, even among the Western European systems reviewed, there are important differences in approach. French law is the most open in principle to such liability (but subject to limitations in practice such as a strict burden of proof); German law least so, since it requires something over and above knowing assistance or inducement, amounting to improper conduct. English and United States law take an intermediate position; there is liability in principle for deliberate and knowing inducement, but this is subject to the defence of

[42] See, e.g., Saqlain Masoodi, "Civil Liability in English and Islamic Laws. A Comparative View" (1992) 12 *Islamic & Comp LR* 34, 34–37.

[43] Ibid., 36 citing Ibn Rushd.

[44] See ibid., 39.

[45] Ibid., 49.

[46] Ibid., 43.

[47] Ibid., 44, 49.

[48] Cf. K. Zweigert & H. Kötz, *An Introduction to Comparative Law* (3rd ed., trans. T. Weir, Oxford: 1987) 622–623.

justification and the proof of actual damage arising from the breach. Secondly, the rules in question operate within the framework of a developed system of regulation of the types of lawful contracts (e.g., in the field of competition law). Thus the statement of a general principle that any knowing interference with the performance of any contract constitutes a delict or a tort is an oversimplification of a more complex situation. Thirdly, in all the systems reviewed, the relevant rules would be classified as "primary" rather than "secondary", in the sense of the draft articles, if that classification were relevant to them.